

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
EASTERN DIVISION

OHIO CASUALTY INSURANCE COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3:06-cv-977-MEF
	)	
MANIFOLD CONSTRUCTION, LLC, et al.,	)	
	)	
Defendants.	)	

**MOTION TO DISMISS**

COME NOW the Defendants, Whittelsey Properties, Inc., C.S. Whittelsey, III, and C.S. Whittelsey, IV (collectively referred to herein sometimes as “Whittelsey”), and move this Honorable Court to dismiss Plaintiff’s complaint for declaratory judgment, and as grounds therefore, states as follows:

1. On the 31<sup>st</sup> day of October, 2006, Plaintiff, Ohio Casualty Insurance Company (hereinafter “Ohio Casualty”), filed its complaint for declaratory judgment to determine the rights and obligations of Ohio Casualty under a policy of insurance it issued to Manifold Construction, LLC and Jack Manifold, co-defendants in the present case.

2. On the 4<sup>th</sup> day of December, 2006, Whittelsey, by and through their attorneys, accepted service of Ohio Casualty’s complaint.

3. On or about the 13<sup>th</sup> day of March, 2006, Ohio Casualty filed its motion for limited intervention in the case filed in the Circuit Court of Lee County, Alabama (hereinafter referred to as “Lee County Case”), as referenced in its complaint, seeking to intervene for “the limited purpose of procuring the [trial] Court to submit interrogatories to the jury relevant to the issue of its duties under two liability insurance policies issued to [Manifold and Jack].”

4. On the 2<sup>nd</sup> day of November, 2006, after the jury returned its verdict in favor of Whittelsey in the Lee County Case, the trial court instructed the jury to return to the jury deliberation room while the court took up some further matters. After the jury was excused to return to the jury deliberation room, the trial court asked counsel for Ohio Casualty, Christopher Lyle McIlwain (hereinafter referred to as "McIlwain"), counsel in the case at bar, if he would like to be heard on Ohio Casualty's motion. McIlwain announced on the record that he wished to withdraw Ohio Casualty's motion for limited intervention.

5. Ohio Casualty's present action mirrors its motion for limited intervention in the Lee County Case.

6. Ohio Casualty's present action was filed while its motion for limited intervention in the Lee County Case was still pending.

7. By withdrawing its motion for limited intervention, Ohio Casualty waived any right it may have had to pursue a declaratory judgment as to the same issues raised in its motion for limited intervention.

8. Ohio Casualty's complaint for declaratory judgment is due to be dismissed. See Ameritas Variable Life Ins. Co. v. Roach, 411 F.3d 1328 (11thCir. 2005) and Ala.Code 1975 § 6-5-440.

9. Defendants have filed herewith a brief in support of this motion.

WHEREFORE, THE PREMISES CONSIDERED, Defendants pray this Honorable Court will dismiss Plaintiff's complaint for declaratory judgment.

Respectfully submitted this the 4<sup>th</sup> day of December, 2006.

WHITTELSEY, WHITTELSEY & POOLE, P.C.

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/s/ Davis B. Whittelsey  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing document on the parties listed below electronically or by placing a copy of the same in the United States mail, postage prepaid, to their correct address on this the 4<sup>th</sup> day of December, 2006.

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